

Federal Communications Commission

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

)
Amendment of Section 73.606(b),)
Table of Allotments,)
TV Broadcast Stations,)
(Appleton, New London and)
Suring, Wisconsin))

MM Docket No. 92-299
RM-8049

To: The Chief, Allocations Branch

REPLY COMMENTS OF ARIES TELECOMMUNICATIONS CORPORATION

Aries Telecommunications Corporation ("Aries"), the licensee of television station WGBA(TV), Green Bay, Wisconsin, by its attorneys, hereby submits its Reply Comments on the Commission's Notice of Proposed Rule Making in the captioned proceeding, 8 FCC Rcd 181 (M.M. Bur., released January 8, 1993) ("NPRM"). As set forth herein, Wisconsin Voice of Christian Youth, Inc. ("WVCY"), the proponent of the instant allotment proposal, has yet to justify an allotment that is indisputably contrary to numerous Commission allotment policies. The overwhelming weight of public interest factors necessitates that the allotment modification proposed by WVCY be rejected.

Background

1. The subject NPRM, which stems from a petition for rulemaking filed by WVCY, proposes the reallocation of television Channel 14 from Suring, Wisconsin to either Appleton, Wisconsin or New London, Wisconsin, and the concomitant modification of the

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license of WVCY's station WSCO(TV), Suring, Wisconsin, to specify operation at the new community.

2. Aries filed comments on the NPRM, arguing that neither of the alternative allotment proposals contained in the NPRM should be adopted. Aries first demonstrated that both proposed allotments would patently violate the Commission's established prohibition against the removal of a community's local transmission service, as both proposals would entail the removal of the only television channel allotted to Suring. See Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License, 5 FCC Rcd 7094, 7096 (1990) ("Community of License MO&O"). Moreover, Aries noted that both proposed allotments would violate the Commission's "freeze" on proposals to amend the Television Table of Communities in certain metropolitan areas,^{1/} since Suring, Appleton and New London all are within the Milwaukee, Wisconsin "freeze area."^{2/}

3. Indeed, in its NPRM the Commission itself reiterated that it generally considers proposals to remove a community's

^{1/} See Advanced Television Systems and Their Impact on the Existing Television Service, 52 Fed. Reg. 28,346 (July 29, 1987); Order, RM-5811, Mimeo No. 4074 (released July 17, 1987) ("Freeze Order").

^{2/} Aries had made these same points in an opposition to WVCY's petition for reconsideration of the Commission's initial denial of its rulemaking petition. As noted in Aries' initial Comments on the NPRM, Aries' primary concern is with the availability of advanced television ("ATV") spectrum in the Green Bay area. Adoption of either of the proposals in the NPRM would reduce the availability of such spectrum.

only transmission service to be contrary to the public interest. The NPRM also concluded that the amendments to the Table sought by WVCY are subject to the Freeze Order. The NPRM sought comment on WVCY's proposals in order to determine whether there is sufficient reason for waiving either of these prohibitions.

4. Aries demonstrated in its initial comments that no such justification exists. As to WVCY's proposal to remove Suring's only local transmission service, not only is there a total lack of countervailing public interest benefits, but the proposed amendments would create an additional public interest detriment by creating a considerable "gray area" and leaving another area served by only two signals. Furthermore, a waiver of the metropolitan area "freeze" to facilitate WVCY's proposals would undermine the very purpose of the freeze. These proposals entail not only a change in community of the existing Channel 14 allotment, but a move in WSCO(TV)'s transmitter site closer to Milwaukee and a massive increase in power. As such, they would have a highly preclusive effect on the availability of ATV spectrum in the Milwaukee/Green Bay area, and would undermine the ongoing ATV spectrum planning process for that area.

5. The sole basis offered by WVCY for waiver of the prohibition against removal of a community's sole local service and the television "freeze" was Suring's alleged inability to support a full-service television station. Aries showed in its Comments, however, that economic hardship is not a colorable legal basis for ignoring the Commission's established allotment

policies. Moreover, none of WVCY's submissions to the Commission provides as much as a sworn declaration regarding WSCO(TV)'s alleged financial hardship, much less any objective supporting documentation.

6. WVCY filed comments in support of the NPRM. From all indications, these comments were never served upon Aries, which was forced to retrieve a copy of WVCY's comments from the Commission's files. In its Comments, and at the Commission's request, WVCY specifies that it is seeking the reallocation of Channel 14 from Suring to New London. The proposal to reallocate the channel to Appleton should therefore be dismissed. WVCY concedes that by its proposal, Suring will lose its only transmission service. WVCY further concedes that the reallocation of Channel 14 to New London will create "a loss of WSCO service to an area of 3,745 square kilometers in which 19,257 persons reside," including a gray area of 389 square kilometers and 807 persons and an area of 113 square kilometers and 145 persons that will receive only two services. WVCY Comments, Exh. 1, p.3. WVCY states that it "is prepared to continue to broadcast programming [over WSCO(TV)] specifically designed to meet the needs and interests of Suring and its surrounding area." WVCY Comments at 5-6. It also states its willingness to apply for and construct either a low power television station or a television translator designed to cover the loss area. Id. at 7.

7. WVCY once again argues that its proposal to reallocate Channel 14 should be granted despite these detriments because

Suring cannot support a full-service facility. Once again, however, WVCY offers no sworn objective evidence to support this contention. WVCY offers this same claim as a justification for waiving the television "freeze," and further claims that the reallocation of Channel 14 to New London "will have only a limited impact on spectrum availability for advanced television." Id. at 8. As shown below, WVCY's arguments are without merit.

Discussion

I. WVCY's Allotment Proposal Should Be Dismissed for WVCY's Failure to Serve Its Comments on Aries

8. As noted above, WVCY did not serve Aries with a copy of its comments on the NPRM. Any pleading which is not served on the parties to the proceeding is an ex parte communication. See 47 C.F.R. § 1.1202(b). Moreover, since the instant rulemaking proceeding is restricted in nature (NPRM, para. 17), ex parte communications are prohibited. Aries previously filed an opposition to WVCY's petition for reconsideration of the Commission's dismissal of its rulemaking petition, and furthermore, the NPRM was ordered to be sent to Aries' counsel. Aries is therefore unquestionably a party to this proceeding. WVCY could not help but be aware of this, and its failure to serve Aries with its comments is an ex parte communication of the most blatant sort.

9. In allotment rulemaking proceedings, the Commission has not hesitated to dismiss proposals for the proponent's failure to

properly serve pleadings on adverse parties. See Bay City, et al., Texas, DA 93-131 (M.M. Bur., released March 2, 1993) (counterproposal dismissed due to failure to serve on petitioner); Dushore, Pennsylvania, 5 FCC Rcd 2022 (1990). WVCY's unexplained and inexcusable failure to serve Aries with its comments deserves a similar sanction, and its rulemaking proposal should therefore be dismissed.

II. The Reallocation of Channel 14 from Suring to New London Would Be Contrary to the Public Interest

10. The comments filed in response to the NPRM make clear that under established Commission allotment policies, the reallocation of Channel 14 from Suring to New London would create numerous public interest detriments, with little or no countervailing benefit. First, it remains undisputed that WVCY's proposal would deprive Suring of its only local television service. This in itself requires the denial of the proposal, absent a showing of a compelling reason to waive the prohibition. See Community of License MO&O, supra; see also NPRM, para. 7. WVCY has made no such showing. Quite the contrary, its comments make clear that the reallocation of Channel 14 to New London would create a gray area of nearly 400 square kilometers and over 800 persons, plus an additional 113 square kilometer area which will receive only two services. WVCY's pledges to broadcast Suring-specific programming over its New London station and to construct an LPTV station or translator do not suffice to cure these

disruptions. The Commission has held that programming over nearby stations and LPTV stations do not make up for the absence of a full-power local television service. See Claremore and Tulsa, Oklahoma, 55 R.R.2d 1203, 1204 (M.M. Bur. 1984).

11. Were WVCY's position not weak enough, it is also plain that WVCY's proposal is not entitled even to credit for bringing a first local service to New London. New London is situated on the boundary of Outagamie County, Wisconsin, which is part of the Appleton-Oshkosh-Neenah Metropolitan Statistical Area ("MSA"). Suring is outside the Appleton-Oshkosh-Neenah MSA. In television allotment proceedings, the Commission has employed an expanded definition of "community" that is not limited to municipalities but includes metropolitan areas as well. See St. Louis Telecast, Inc., 22 F.C.C. 625, 713 (1957); see also Bessemer and Tuscaloosa, Alabama, 5 FCC Rcd 669 (M.M. Bur. 1990). Thus, WVCY's proposal, at best, is in reality one to bring a fourth service to the Appleton-Oshkosh-Neenah MSA (the fifth and last allotment priority),^{3/} while depriving a community outside the MSA (Suring) of its only local transmission service (the second allotment priority). See Sixth Report and Order, 41 F.C.C. 148, 167 (1952).

^{3/} The Appleton-Oshkosh-Neenah MSA has three presently allotted channels: Channel 32 in Appleton and Channels 22 and 50 in Oshkosh. Moreover, the Appleton-Oshkosh-Neenah MSA is adjacent to Green Bay, which has six channels allotted to it. Thus, for all practical purposes, WVCY's proposal is to bring an additional service to a market with at least nine channels already allotted.

12. Summarized, WVCY seeks an amendment to the Television Table of Allotments that would (i) take away a community's only local transmission service and (ii) create a substantial gray area and an additional area that would be served by only two stations while (iii) adding, at best, a fourth service to a metropolitan area. WVCY faces a virtually insurmountable burden in justifying such a scheme. Its claimed justification -- Suring's alleged inability to economically support a full-service station -- comes nowhere close to clearing this steep hurdle. In contexts where economic showings are necessary to justify waiver of an established Commission requirement, the Commission requires specific, detailed, and objective showings of the hardship claimed. See, e.g., Television Satellite Stations, 6 FCC Rcd 4212, 4215 (1991) ("specific" evidence such as broker listings and number of buyer inquiries required to satisfy criterion that station cannot be operated as full-service station); Letter to Richard Hildreth, Esq., 7 FCC Rcd 6292, 6294 (M.M. Bur. 1992) (supporting documentation such as income tax returns required to show financial ability to pay forfeiture). A standard at least this high must be required of WVCY, given the plain damage its proposal would do to the Commission's allotment policies.

13. WVCY, however, has yet to submit any supporting documentation, or even a sworn declaration, to support its claims as to WSCO(TV)'s financial hardship. The only actual figures WVCY offers (which are unsworn) relate to the operation of WSCO(TV) by a prior licensee some nine years ago. WVCY states

only in the most conclusory terms that "it was unable to operate the station on a self-supporting basis" once it acquired WSCO(TV) in 1987. Moreover, WVCY states that "the tower leased by WSCO for its antenna was damaged (and later dismantled) and the station ultimately was forced to leave the air on July 5, 1991." WVCY Comments at 6. Thus, WSCO(TV)'s silent status appears related to an event having nothing to do with financial hardship, and surely cannot be considered to have "flowed directly from the inability of the Suring community to support a full-service station." WVCY simply has not adequately shown that WSCO(TV) is incapable of surviving in Suring, particularly given its imposing burden of justifying a proposal that flies in the face of both unambiguous allotment policy and the television freeze.

14. With respect to the freeze, WVCY offers nothing new. The Commission has already decided that WVCY's proposal to reallocate Channel 14 to New London on its face contravenes the freeze, and as shown above, WVCY's financial hardship showing falls far short of the "compelling" one necessary to justify a waiver. While WVCY argues that as a Suring station, WVCY could increase power and move closer to Milwaukee without triggering the freeze, that is not what WVCY proposes to do. Instead, WVCY has proposed to move its site so close to Milwaukee as to require a change in the station's community of license, coupled with a massive increase in power. WVCY's claim that such a change "will have only a limited impact on spectrum availability for advanced television" is simply wrong; it would fundamentally alter the

ongoing ATV planning process for the area. WVCY must suffer the consequences of the proposal it has made.

Conclusion

WVCY cannot be permitted to satisfy its economic whims at the expense of numerous Commission allotment and technical policies. The reallocation of Channel 14 to Suring would result in undeniable public detriments. On the other hand, WVCY has shown no countervailing public benefits. Aries therefore urges that the instant allotment proposal be denied and this proceeding terminated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Valerie A. Mack, a secretary in the law firm of Fisher, Wayland, Cooper and Leader, do hereby certify that true copies of the foregoing "REPLY COMMENTS OF ARIES TELECOMMUNICATIONS CORPORATION" were sent this 16th day of March, 1993, by first class United States mail, postage prepaid, to the following:

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